SUPREME COURT, U.S.
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No. 00-730

In the Supreme Court of the United States

ADARAND CONSTRUCTORS, INC., PETITIONER

v.

NORMAN Y. MINETA, SECRETARY OF TRANSPORTATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the court of appeals misapplied the strict scrutiny standard in determining whether Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination.

2. Whether the United States Department of Transportation's current Disadvantaged Business Enterprise program is narrowly tailored to serve a compelling governmental interest.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-98) is reported at 228 F.3d 1147. The opinion of the district court (Pet. App. 128-201) is reported at 965 F. Supp. 1556.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 2000. The petition for a writ of certiorari was filed on November 3, 2000. The Court granted certiorari on March 26, 2001, and on April 13, 2001, limited the grant to two reformulated questions presented. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Spending Clause, U.S. Const. Art. I, § 8, Cl. 1, and relevant portions of the Fifth and Fourteenth Amendments to the Constitution, U.S. Const. Amends. V, XIV, are reproduced Gov't App. 1a. Relevant provisions of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, 112 Stat. 107, are reproduced Gov't App. 2a-7a, and provisions of the Small Business Act, 15 U.S.C. 631 *et seq.*, are reproduced Gov't App. 8a-17a. Relevant portions of Department of Transportation regulations, 49 C.F.R. Pt. 26, are reproduced Gov't App. 17a-71a; provisions of the Federal Acquisition Regulations, 48 C.F.R. Pt. 19, are reproduced Gov't App. 72a-100a; and the Department of Justice's proposed guidelines for the use of race-conscious remedies in federal spending programs, 61 Fed. Reg. 26,042 (1996), are reproduced Gov't App. 101a-189a.

STATEMENT

Congress has found that many Americans, because "of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control," lack equal "opportunity for full participation in our free enterprise system," and thus are "socially and economically disadvantaged" on account of race or ethnicity. 15 U.S.C.

631(f)(1). See also Act of Oct. 24, 1978, Pub. L. No. 95-507, § 201, 92 Stat. 1760. Congress therefore has attempted to ensure that past discrimination and present bias do not "cause federal funds to be distributed in a manner" which reflects and "reinforce[s] prior patterns of discrimination." *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 504 (1989). *E.g.*, *Fullilove* v. *Klutznick*, 448 U.S. 448, 465 (1980) (plurality) (upholding legislation addressing the "effects of past inequalities stemming from racial prejudice" that continue to "adversely affect[] our present economic system") (quoting H.R. Rep. No. 468, 94th Cong., 1st Sess. 1-2 (1975)).

This case arises out of Congress's longstanding efforts to distribute federal highway construction and transit funds, and the opportunities created by those funds, in a manner that does not reflect or reinforce prior and existing patterns of discrimination in that industry. Specifically, this case concerns the constitutionality of Congress's recent reauthorization of programs designed to address discrimination in highway contracting, and the Department of Transportation's (DOT's) efforts to implement that statutory directive.

As petitioner concedes (Br. 15), there has been considerable confusion over precisely which statutory and regulatory provisions petitioner is challenging. The district court held that the Subcontractor Compensation Clause (SCC) that petitioner originally challenged was unconstitutional, Pet. App. 200; the court of appeals affirmed that conclusion, *id.* at 59-60; DOT has not sought further review; and that program has been discontinued, *id.* at 97. The regulatory provisions that this Court considered in *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995) (*Adarand I*), moreover, have been replaced with new regulations designed to respond to that decision, 64 Fed. Reg. 5096, 5101-5103, 5129 (1999); 49 C.F.R. Pt. 26; see also 61 Fed. Reg. 26,042-26,063 (1996).

Consequently, what remains in controversy in this case is quite narrow; the case at most involves a facial challenge to Congress's reauthorization of the Disadvantaged Business Enterprise (DBE) program and the current version of the regulations that implement that statutory provision. Petitioner, moreover, purports to limit its challenge further, asserting (Br. 15-16, 27) that it is not challenging *any* of the conditions DOT places on aid to States and localities through DOT's DBE program. Instead, petitioner now claims that it is challenging only the statutes and regulations relating to DOT's *direct procurement* of highway construction on federal lands, which represents a small fraction (less than one percent in 1999) of total federal highway construction and transit spending. DOT, however, does *not* use race-conscious factors (such as incentives or contract goals) in making direct federal procurement decisions in *any* jurisdiction in which petitioner operates. The court of appeals held that petitioner lacks standing to challenge the direct federal procurement provisions that petitioner now targets; and petitioner never sought review of that holding. Thus, it is not at all clear that there remains any cognizable controversy before the Court.

Nonetheless, the decision below, this Court's second question presented, and even petitioner at various points in its brief, focus on DOT's DBE regulations, which govern DOT's aid program for States and localities. Unlike the direct federal procurement provisions, DOT's DBE regulations for state and local aid permit the award of contracts based on race-conscious measures in jurisdictions in which petitioner operates and so provide a potential basis for prospective relief. A description of those DOT regulations, of the regulations governing direct federal procurement in all federal agencies, and of this case's complex procedural history, is set forth below.

1. *DOT's Current DBE Program.* In response to this Court's decision in *Adarand I*, DOT in February of 1999 issued new regulations revamping its DBE program. Consistent with TEA-21 (§ 1101(b)(2)(B), 112 Stat. 113), DOT's DBE program employs the definitions of "social" and "economic" disadvantage contained in the Small Business Act (SBA), 15 U.S.C. 631 *et seq.* See also *Adarand I*, 515 U.S. at 208 (noting similar incorporation of those definitions by TEA-21's predecessors). Thus, for purposes of the DBE pro-

gram, an individual is "[s]ocially disadvantaged" if he or she has been "subjected to racial or ethnic prejudice or cultural bias because of" his or her "identity as a member of a group without regard to * * * individual qualities." 15 U.S.C. 637(a)(5). An individual is "[e]conomically disadvantaged" if his or her "ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. 637(a)(6)(A). Those basic definitions are race neutral. The determining factor is not the individual's race; it is having suffered discrimination on account of race, ethnicity or cultural bias—without regard to what that race, ethnicity or culture might be—and having sustained diminished capital and credit opportunities compared to those who have not been victims of such discrimination. The Secretary's regulations make it clear that the DBE program is aimed at everyone, regardless of race or ethnicity, who meets the statutory criteria for social and economic disadvantage based on individual experience. See 49 C.F.R. 26.61(b) & Pt. 26, App. E.

As required by Congress in TEA-21 (§ 1101(b)(2)(B), 112 Stat. 113), the Secretary's regulations also incorporate a race-based presumption from the SBA. See *Adarand I*, 515 U.S. at 204 (noting similar requirement in predecessor statute). In particular, TEA-21 adopts the SBA's presumption "that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the" SBA, 15 U.S.C. 637(d)(3)(C). See 49 C.F.R. 26.67(a). Pursuant to the statute, see TEA-21, § 1101(b)(2)(B), 112 Stat. 113, the Secretary's regulations articulate a further presumption that women are disadvantaged in the highway construction and transit industry. See 49 C.F.R. 26.67(a). Those presumptions of social and economic disadvantage are rebuttable. See 49 C.F.R. 26.67(a) and (b).

Pursuant to his authority to "establish minimum uniform criteria for State governments to use in certifying whether a concern qualifies" as a DBE, see TEA-21, § 1101(b)(4), 112 Stat. 114; *Adarand I*, 515 U.S. at 208, the Secretary has issued regulations designed to channel benefits under the DBE program to firms owned by individuals who are, in fact, socially and economically disadvantaged. DOT thus requires, 49 C.F.R. 26.67(a)(1), applicants for DBE certification who are statutorily presumed to be disadvantaged to "submit a signed, notarized certification that" they are "in fact, socially and economically disadvantaged." By statute, applicants are not, in fact, socially and economically disadvantaged unless they have been "subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities," 15 U.S.C. 637(a)(5), *and* their "ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged," 15 U.S.C. 637(a)(6)(A). The regulations admonish applicants that DOT "may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of a DBE in any DOT-assisted program." 49 C.F.R. 26.107(e).

Applicants for DBE certification must also disclose their owners' personal net worth, with appropriate documentation. 49 C.F.R. 26.67(a)(2)(i). If the owner's covered assets exceed $750,000, the presumption of economic disadvantage is conclusively rebutted and the individual is ineligible for the DBE program, regardless of race, ethnicity or gender. 49 C.F.R. 26.67(b)(1). Anyone may challenge DBE certifications. 49 C.F.R. 26.87. If a state or local grant recipient has a reasonable basis to believe that the owner of a DBE in fact is not socially and economically disadvantaged, it may commence an investigation. 49 C.F.R. 26.67(b)(2).

To ensure that remedies for the effects of discrimination are tailored to local conditions, the Secretary's regulations

require States and localities receiving federal aid to establish numerical measurements, based on local DBE availability and other evidence, to assess discrimination in their own jurisdictions. In particular, state and local recipients must estimate "the level of DBE participation [the recipient] would expect absent the effects of discrimination." 49 C.F.R. 26.45(b). Recipients are expressly prohibited from establishing a rigid figure based on past goals, a flat ten percent goal, or the racial composition of the local populace. *Ibid.* Instead, recipients must first consider "demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on * * * DOT-assisted contracts." 49 C.F.R. 26.45(b) and (c). Recipients then must "examine all of the evidence available" in the jurisdiction to determine what adjustments should be made to ensure that the resulting standard realistically reflects the level of DBE participation that would be expected absent the effects of discrimination. 49 C.F.R. 26.45(d).

With respect to remedies, the Secretary's regulations provide that state and local aid recipients must seek to eliminate the effects of discrimination through race- and gender-neutral means to the maximum feasible extent. 49 C.F.R. 26.51(a). Recipients must consider arranging solicitations in ways that facilitate participation by all small businesses, including DBEs; providing race-neutral assistance in overcoming limitations such as the inability to obtain bonding or financing; offering technical assistance and services to small businesses; and engaging in outreach efforts. 49 C.F.R. 26.51(b). Race-conscious measures, such as DBE goals for individual contracts, may be used *only* if race-neutral means prove insufficient. 49 C.F.R. 26.51(d). Quotas are expressly prohibited, and the Secretary will not authorize the use of set-asides except in the most egregious instances of otherwise irremediable discrimination. 49 C.F.R. 26.43. Recipients must discontinue the use of race-conscious measures if, at any point, it appears that they can achieve adequate DBE participation through race-neutral means. 49 C.F.R. 26.51(f)(1).

Recipients of DOT financial assistance may apply to DOT for waivers from almost any DBE regulation if they can achieve or have achieved equal opportunity through other approaches, or if special circumstances make compliance impractical. 49 C.F.R. 26.15. Moreover, no penalty is imposed on contractors or recipients for failing to meet annual goals. 49 C.F.R. 26.47. When race- and gender-neutral measures are inadequate and a recipient establishes a DBE participation goal for particular contracts, contractors need only pursue that goal in good faith; they are not required to achieve it. 49 C.F.R. 26.53(a). If a "bidder/offeror does document adequate good faith efforts," a State or locality "must not deny award of the contract on the basis that the bidder/offeror failed to meet the goal." 49 C.F.R. 26.53(a)(2).

2. *Direct Federal Procurement.* Although the above-described regulations are the only provisions that may arguably provide any basis for prospective relief, petitioner asserts that it is not challenging those provisions, and purports to challenge only the statutory and regulatory provisions that govern DOT's direct procurement of highway construction on federal lands. The procedures and standards for certifying DBEs in the state and local aid program (described pp. 3-5, *supra*) and those used for purposes of direct federal procurement share some critical features. See Pet. Br. 10; note 1, *infra*. Nonetheless, DOT's direct procurement is generally governed by a different regulatory regime. In particular, while DOT's state and local aid program is governed by DOT's DBE regulations, issued by the Secretary of Transportation under TEA-21, direct federal procurement is governed by the SBA, including Sections 8(d)(4)-(6), 15 U.S.C. 637(d)(4)-(6), and the regulations promulgated thereunder. See 61 Fed. Reg. at 26,043 & n.5; 64 Fed. Reg. at 5096; 49 C.F.R. 26.3. Those provisions are not specific to DOT; they apply government-wide.

The SBA broadly seeks to promote contracting opportunities for small businesses, including small disadvantaged busi-

nesses or "SDBs" (which are similar to DBEs),[1] HUBZone small businesses, veteran-owned businesses, service-disabled veteran-owned businesses, and women-owned businesses. Section 8(d)(1) of the SBA establishes a policy of ensuring that such businesses have opportunities to participate in the performance of federal contracts. 15 U.S.C. 637(d)(1). Section 8(d)(4) of the SBA requires businesses seeking federal contracts to adopt, and make a good faith effort to comply with, a subcontracting plan. 15 U.S.C. 637(d)(4); 48 C.F.R. 19.702. Under Section 8(d)(6), the subcontracting plan must describe the efforts the business will undertake to ensure "that small business concerns," including SDBs, women-owned businesses, HUBZone businesses, and veteran-owned businesses, "will have an equitable opportunity to compete for subcontracts." 15 U.S.C. 637(d)(6)(C). Although the subcontracting plan must establish "percentage goals" for the use of such businesses, 15 U.S.C. 637(d)(6)(A); 48 C.F.R. 19.704, no penalty may be imposed on any prime contractor that fails to meet those goals, so long as the prime contractor has made a "good faith effort," 48 C.F.R. 19.705-7. Finally, the SBA authorizes federal agencies to use financial or other incentives as the agency "may deem appropriate in order to encourage" subcontracting with such small businesses. See 15 U.S.C. 637(d)(4)(E).

Following this Court's decision in *Adarand I*, the Justice Department issued proposed guidelines to govern the use of

[1] The Small Business Administration's regulations governing SDB certification recognize a rebuttable presumption of disadvantage (13 C.F.R. 124.103(b)(1), 124.1008(e)(1)); require a statement of social disadvantage (13 C.F.R. 124.103, 124.1008(e)); impose a cap of $250,000 or $750,000 for determining economic disadvantage (13 C.F.R. 124.104(c)(2), 124.1008(e)(1)); and allow any person to challenge a certification decision (13 C.F.R. 124.103(b)(3), 124.1008(e)(1)(ii), 124.1017). Women-owned businesses are not presumed to be SDBs under the SBA, but they are presumed to be DBEs under TEA-21 and DOT's regulations. The Small Business Administration and DOT recently entered into a cooperative agreement regarding the use of certifications in the two programs. See 66 Fed. Reg. 23,208 (2001).

race-conscious remedies under the SBA, such as contract goals and financial incentives, to ensure compliance with constitutional requirements. See 61 Fed. Reg. at 26,042; 48 C.F.R. 19.201. Those guidelines in some respects parallel DOT's DBE program. The Department of Commerce now performs market-specific benchmark studies to estimate "the level of" SDB "contracting that one would reasonably expect to find in a market absent discrimination or its effects." 61 Fed. Reg. at 26,045. Compare pp. 5-6, *supra* (DOT requirement for federal aid recipients). The Department of Commerce begins by calculating the capacity of SDBs available and qualified to perform government contracts in the relevant region and industry, and then compares that to the capacity of non-SDB contractors, accounting for additional factors such as age and size. See 61 Fed. Reg. at 26,045-26,046. The Department of Commerce then may make adjustments based on relevant data and regression analysis that "holds constant a variety of variables that might affect business formation so that the effect of race can be isolated." *Id.* at 26,046. Where the comparison between the benchmark and actual SDB utilization does not indicate a disparity suggesting discrimination or its continuing effects, the guidelines *prohibit* federal agencies from using race-conscious mechanisms to promote SDB participation. See *id.* at 26,046-26,047; 48 C.F.R. 19.201(b).

If, on the other hand, the benchmark study reveals disparities suggesting that discrimination or its effects still influence the allocation of federal opportunities and funds, the guidelines "require[] that agencies at all times use race-neutral alternatives," such as technical assistance and outreach, "to the maximum extent possible." See 61 Fed. Reg. at 26,049. For example, agencies must consider eliminating surety costs from bids where bonding presents a barrier to entry, ensure that SDBs are not excluded from mailing lists, and eliminate practices that disproportionately disadvantage SDBs. *Ibid.* See also 48 C.F.R. 19.202-2. Contracting officers must also consider dividing contracts into reasonably small lots, adjusting delivery schedules, or altering contract

structures to facilitate small business participation. 48 C.F.R. 19.202-1. Only "where those efforts are insufficient to overcome the effects of past and present discrimination can race-conscious efforts be invoked." 61 Fed. Reg. at 26,049. Even then, agencies may not "set contracts aside for bidding exclusively by" SDBs. *Id.* at 26,048. The system thus represents "a good faith effort to remedy the effect of discrimination," but without guaranteeing any particular level of SDB contracting. *Ibid.*

The Department of Commerce has completed one benchmark study. See 64 Fed. Reg. at 52,806; 63 Fed. Reg. 35,714 (1998). As a result of that study, the use of race-conscious criteria in direct federal procurement of highway construction is proscribed in a majority of regions. See 64 Fed. Reg. at 52,807 (for major industry group 16, race-conscious criteria proscribed except in the East and West South Central regions). Consequently, as petitioner concedes, DOT cannot use race-conscious remedies to encourage the use of DBEs in direct federal procurement contracts in areas "such as Colorado, Adarand's area of operations." Pet. Br. 14.

3. *Procedural History*. This case arose out of the Federal Highway Administration's (FHWA's) former use of SCCs, a now-rescinded device FHWA used under the statutes that preceded TEA-21. FHWA is the agency within DOT responsible for highway construction programs. SCCs provided bonus payments as a financial incentive to prime contractors for subcontracting with SDBs/DBEs on direct federal highway construction projects. See *Adarand I*, 515 U.S. at 209. The district court declared the SCC program, as previously administered, unconstitutional, Pet. App. 200; the court of appeals affirmed that conclusion, *id.* at 59-60; and DOT has not sought review of that ruling. As a result, the now-rescinded SCC, the only feature of DOT's former regulatory regime ever allegedly applied to petitioner's detriment, is no longer at issue in this case. This lawsuit, however, has outlived the program that provoked it.

a. In 1989, FHWA's Central Federal Lands Highway Division awarded a prime contract to construct a highway on

federal land in West Dolores, Colorado, to Mountain Gravel & Construction Company. Pet. App. 132. The contract contained an SCC, and Mountain Gravel selected Gonzales Construction, a DBE certified by the State of Colorado, to be a subcontractor on a portion of the job. *Id.* at 132-133. On August 10, 1990, petitioner brought this action for declaratory and injunctive relief, claiming that Mountain Gravel had rejected its lower bid for the subcontract because of the SCC. *Adarand*, 515 U.S. at 205. The complaint alleged that the SCC violated 42 U.S.C. 1983, 42 U.S.C. 2000d *et seq.* (Title VI), and the Fifth and Fourteenth Amendments.

The district court initially upheld the SCC under intermediate scrutiny, *Adarand Constructors, Inc.* v. *Skinner*, 790 F. Supp. 240, 244-245 (D. Colo. 1992), and the Tenth Circuit affirmed, *Adarand Constructors, Inc.* v. *Peña*, 16 F.3d 1537, 1539 (1994). This Court vacated the court of appeals' judgment, holding that strict scrutiny governs whether race-based classifications violate the equal protection component of the Fifth Amendment's Due Process Clause. *Adarand I*, 515 U.S. at 227. The Court remanded the case for a determination of "whether any of the ways in which the Government uses subcontractor compensation clauses can survive strict scrutiny." *Id.* at 238.

Following remand, petitioner filed a First Amended Complaint, seeking, *inter alia*, a declaration that "§ 105(f) of STAA, § 106(c) of STURAA, § 1003(b) of ISTEA, § 8(d) of the SBA (15 U.S.C. § 637(d)) and 15 U.S.C. § 644(g), the regulations promulgated thereunder, and the contract provisions promulgated pursuant to those statutes and regulations are unconstitutional as applied to highway construction in the State of Colorado." Pet. App. 141.[2] In June of 1997,

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[2] The STAA, the STURAA, and ISTEA are the statutory predecessors to TEA-21. The STAA is the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 105(f), 96 Stat. 2100; STURAA is the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, § 106(c)(2)(B), 101 Stat. 146; and ISTEA is the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 1003(b), 105 Stat. 1919-1921. The definitions of social and economic

before the Secretary's revised regulations (described pp. 3-7, *supra*) took effect, the district court granted petitioner's motion for summary judgment. Pet. App. 128-201. The court found that the DBE program met the compelling interest requirement of the strict scrutiny test. The court was "unpersuaded by [petitioner's] argument that the vast body of evidence before Congress as it considered the challenged enactments, and the numerous studies compiled more recently," are insufficient to establish Congress's compelling interest. *Id.* at 177. Congress, the court held, had "a strong basis in evidence from which it could conclude there were significant discriminatory barriers facing minority businesses." *Id.* at 178.

The district court, however, concluded that the SCC program was not sufficiently narrowly tailored to meet that need. Pet. App. 181-200. The court declared unconstitutional Section 106(c) of STURAA and Section 1003(b) of ISTEA, which authorized the DBE program for federally aided state and local projects, as well as the SCC, which was used in direct federal procurement of highway construction on federal lands. *Id.* at 200-201. DOT moved for the court to clarify the scope of the order, arguing that the federal aid program for state and local projects was not at issue, but the court denied DOT's motion. R. 109 (June 23, 1997).

b. In 1998, while the case was pending on appeal before the Tenth Circuit, Congress reconsidered the DBE program and determined that remedial measures remained necessary to address the effects of discrimination and, accordingly, reauthorized those measures in TEA-21. Congress considered evidence of overt discrimination in the awarding of subcontracts, discrimination in the provision of business loans and bonding, and the adverse consequences of an "old-boy" network and bid-shopping practices that continued the exclusion of certain groups. 144 Cong. Rec. S1409, S1413, S1422, S1429-1430 (Mar. 5, 1998). See 64 Fed. Reg. at 5100-

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disadvantage, including the racial presumptions, have remained essentially unchanged from the STAA to TEA-21.

5102 (summarizing). It also considered data showing that, where States terminated their own DBE programs, DBE participation in the state-funded portion of the highway program fell to nearly zero. See 144 Cong. Rec. at S1404, S1409-1410, S1420 (Mar. 5, 1998); *id.* at S1482 (Mar. 6, 1998).

Congress also considered DOT's proposed revisions to its DBE regulations. DOT had proposed those revisions to respond to this Court's decision in *Adarand I*, to address outstanding practical concerns, and to ensure that the program more narrowly benefits small firms owned by individuals who truly have suffered the effects of discrimination. 144 Cong. Rec. at S1409, S1423-1425, S1430-1431 (Mar. 5, 1998); *id.* at S1485-1486 (Mar. 6, 1998); *id.* at S5413-5414 (May 22, 1998). The House Report noted that DOT would continue its review of "the DBE program in light of recent court rulings" and that DOT had "proposed new regulations to ensure that the program withstands constitutional muster." H.R. Rep. No. 550, 105th Cong., 2d Sess. 410 (1998). During the debates, both houses of Congress considered and rejected amendments that would have eliminated the DBE program. 144 Cong. Rec. at S1496 (Mar. 6, 1998), H2011 (Apr. 1, 1998). In February of 1999, DOT issued the anticipated regulations, described above (pp. 3-7, *supra*).

c. Shortly thereafter, in March of 1999, the court of appeals held the case moot because Colorado had certified petitioner as a DBE. *Adarand Constructors, Inc.* v. *Slater*, 169 F.3d 1292 (10th Cir. 1999). This Court reversed. *Adarand* v. *Slater*, 528 U.S. 216 (2000) (per curiam). After this Court remanded the case, FHWA eliminated the SCC, the financial incentive program the Court had considered in *Adarand I*. See Pet. App. 97 ("Adarand does not dispute" that "the SCC, which spawned this litigation in 1989, is no longer in use.").

4. *The Court Of Appeals' Decision.* After supplemental briefing in light of those developments, the court of appeals affirmed in part and reversed in part. Pet. App. 1-81.

a. The court of appeals first identified the statutory and regulatory provisions properly at issue in this case. The court of appeals concluded that petitioner had standing to

challenge the SCC program, which had formed part of the contract petitioner had been denied, and to raise a facial challenge to "the race-based rebuttable presumption used in some certifications under the Subcontracting Compensation Clause" and incorporated from the SBA into TEA-21. Pet. App. 13. The court of appeals, however, concluded that petitioner lacks standing to challenge the presumption of disadvantage for women-owned enterprises. *Id.* at 13-14. The court further held that petitioner lacks standing to challenge any provision of the SBA other than the definitions that are incorporated into TEA-21. Thus, the court concluded that petitioner cannot make a "generalized challenge" to the SBA's policy regarding contracting opportunities for small disadvantaged businesses, or "paragraphs (4)-(6) of 15 U.S.C. 637(d)," *i.e.*, Sections 8(d)(4)-(6) of the SBA, which address subcontracting plans. Pet. App. 14. See also *id.* at 86 n.35.

b. Turning to the constitutionality of the statutes and regulations properly at issue, the court of appeals agreed with the district court that the government had established a compelling interest in "eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies," Pet. App. 54, and in "remedying the effects of racial discrimination and opening up federal contracting opportunities to members of previously excluded minority groups," *id.* at 25. The court of appeals found "a strong basis in [the] evidence" before Congress for concluding "that racial discrimination and its continuing effects have distorted the market for public contracts." *Id.* at 24. For example, the court noted evidence before Congress showing that prime contractors refused "to employ minority subcontractors due to 'old boy' networks." *Id.* at 34. See also *id.* at 41 (noting that the evidence "strongly supports the thesis that informal, racially exclusionary business networks dominate the subcontracting construction industry, shutting out competition from minority firms"). The evidence was "particularly striking in the area of the race-based denial of access to capital." *Id.* at 35. See also *id.* at 34-38 (reviewing evidence). Minority subcontractors also confronted "overt racial discrimination" in areas such as the provision of performance and payment bonds needed to compete for government contracts. *Id.* at 42-43. Further, the court explained, there was evidence of discrimination in pricing by suppliers, under which "nonminority subcontractors receive special prices and discounts from suppliers not available to minority subcontractors," a practice that makes minority subcontractors less competitive. *Id.* at 44.

The court of appeals also relied on local disparity studies conducted by numerous state and local governments. Pet. App. 44-48. While conceding the limitations of those sources, the court concluded that the consistent disparity between the use and availability of qualified DBE subcontractors "raises an inference that the various discriminatory factors" identified by Congress had "created that disparity." *Id.* at 46. The significance of the studies, the court explained, was increased by specific evidence showing that discrimination reduced the opportunities of existing minority enterprises and prevented the formation of new ones. *Id.* at 48. Finally, the court noted that, when States discontinued their own DBE programs, DBE participation dropped dramatically or disappeared altogether. *Id.* at 49. "Although that evidence standing alone is not dispositive, it strongly supports the government's claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination." *Ibid.*

The court of appeals declined to accept petitioner's "vague urgings" that the studies were unreliable, Pet. App. 46-47 n.14, or petitioner's "highly general criticism" of methodology, *id.* at 51. Petitioner, the court explained, had failed to identify specific flaws in the studies or introduce evidence of its own in district court, despite opportunities to do so. *Ibid.* In sum, the court concluded, the evidence "demonstrates that both the race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises * * * are caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market." *Id.* at 52. "The Consti-

tution does not obligate Congress to stand by idly and continue to pour money into an industry so shaped by the effects of discrimination that the profits to be derived from congressional appropriations accrue exclusively to the beneficiaries, however personally innocent, of the effects of racial prejudice." *Ibid.*

c. The court of appeals also concluded that the current DBE program is "narrowly tailored." The court first found that certain provisions of the *prior* DBE certification process failed the narrow-tailoring test. Pet. App. 72-74. Specifically, it held that the automatic use of financial bonuses to encourage use of DBEs, as originally contemplated by the SCC, could not pass constitutional muster. *Id.* at 79-80. But the court concluded that the new DOT regulations cured the constitutional deficiencies. *Ibid.* The court of appeals explained that petitioner had not challenged the district court's finding that Congress had tried without success to cure the effects of discrimination through race-neutral means. *Id.* at 57-58. Moreover, DOT's regulations require recipients to maximize the use of race-neutral means before resorting to race-conscious methods, 49 C.F.R. 26.51(a), a requirement that helps to ensure narrow tailoring. Pet. App. 59-60.

The court of appeals also stressed the program's durational limits. The DOT DBE program itself expires at the end of fiscal year 2003 together with TEA-21. Pet. App. 62-63. Congress's extensive debate regarding whether to renew the DBE program before passing TEA-21 underscored Congress's view that there was a continuing remedial need for the DBE program. *Ibid.*

The court of appeals held that the DBE program complied with the narrow tailoring considerations discussed in *United States* v. *Paradise*, 480 U.S. 149 (1987). First, the court found that 49 C.F.R. 26.15's express waiver provision, which allows recipients to seek exemption from DBE requirements "despite the already non-mandatory nature of DBE programs," afforded appropriate flexibility. Pet. App. 64. Second, each state and local recipient of federal funds must establish its own numerical goals based on local circumstances. *Id.* at 66. Third, the DBE program does not impose an undue burden on third parties. *Id.* at 69-71. For example, the new regulations "require recipients to ensure that DBEs are not 'so overconcentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate.'" *Id.* at 70 (quoting 49 C.F.R. 26.33(a)). Finally, the court of appeals rejected petitioner's argument that Congress must inquire into discrimination against each particular minority group in each State's construction industry, so as to ensure that the DBE program is not over- or under-inclusive. *Id.* at 71-79.

SUMMARY OF ARGUMENT

I. DOT's current DBE program is not unconstitutional on its face. DOT has discontinued the SCC program that caused petitioner's alleged injury, and petitioner alleges no specific injury from DOT's current regulations. Accordingly, petitioner can mount only an abstract facial challenge, and cannot prevail unless it can demonstrate that TEA-21's DBE provisions and the implementing regulations are incapable of constitutional application.

Petitioner has narrowed its challenge to DOT's direct federal procurement activities. However, DOT does not employ any race-conscious measures in making direct procurement decisions in any jurisdiction in which petitioner does business. Accordingly, petitioner lacks standing to challenge the only program it purports to challenge. Indeed, the court of appeals specifically held that petitioner lacks standing to challenge the statutory provisions petitioner now targets, and petitioner has never challenged that holding. It is hard to imagine a more abstract vehicle for this Court to address the serious constitutional issues raised by petitioner.

II. A. DOT's DBE program promotes the "compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (plurality opinion of O'Connor, J.). Petitioner concedes (Br. 22) that the use of race-conscious

measures as "a last resort effort to 'remedy private discrimination'" constitutes a "possible justification" for race-conscious government action. Petitioner, therefore, concentrates its attack not on the sufficiency of the government's interest, but on the adequacy of the record before Congress. But Congress authorized the Secretary to adopt a DBE program against a backdrop of extensive evidence of public and private discrimination in highway contracting. Congress likewise authorized the DBE program only after race-neutral efforts to improve access to capital and ease bonding requirements had proven inadequate. Congress then reauthorized the DBE program on three separate occasions, each time after further investigation. Whatever the alleged methodological shortcomings of some of the studies before Congress, Congress had a sufficient evidentiary basis to enact legislation designed to ensure that federal funds do not reinforce observed patterns of discrimination. This is true even if Congress did not have evidence of discrimination in every jurisdiction across the Nation. Congress is not limited to remedying discrimination that exists uniformly throughout the United States, especially where the implementing regulations seek to limit race-conscious remedies to jurisdictions where the effects of discrimination remain a problem and race-neutral remedies have proved insufficient.

B. Congress, as part of its effort to address the lingering problem of discrimination in the distribution of contracting opportunities in federally aided highway projects, granted substantial discretion to the Secretary. DOT regulations defeat petitioner's claim that the program is unconstitutional on its face. First, notwithstanding the statute's racial presumption, the regulations seek to limit DBE status to firms owned by individuals who have suffered the effects of discrimination. Discrimination, not race, is the key to DBE status. For example, if a firm's owner exceeds regulatory net-worth limits, the firm cannot qualify as a DBE, no matter what the owner's race. Second, state and local recipients of federal aid must assess the local market to determine whether there is a need for race-conscious remedies to

redress the effects of discrimination in their jurisdiction. Even where such a need is identified, aid recipients may use race-conscious remedies only as a last resort. Third, the regulations have built-in flexibility to allow aid recipients to address the specific problems confronted in a particular jurisdiction. For example, the regulations make most regulatory provisions waivable. Although petitioner suggests that certain aspects of those regulations will prove ineffectual and that others deviate from the statutory design, neither of those concerns is properly presented in this facial challenge.

Finally, petitioner argues that, even with those regulatory safeguards, the use of the statutory race-based presumption of disadvantage by itself renders the entire program unconstitutional. But this Court has never suggested that the government may not take race into account in attempting to identify the effects of racial discrimination. In jurisdictions where race-neutral remedies suffice, the statutory presumptions of disadvantage serve only to help identify underutilization of DBEs that may evidence discrimination or its effects. In other jurisdictions, the presumptions may result in providing contracting opportunities to businesses owned by individuals who have certified (in a notarized document and subject to the possibility of criminal prosecution) that they have suffered the effects of discrimination, but that is no basis for invalidating the statute and the Secretary's regulations on their face.

ARGUMENT

I. PETITIONER CANNOT PREVAIL ON ITS FACIAL CHALLENGE AND LACKS STANDING TO CHALLENGE THE STATUTORY AND REGULATORY PROVISIONS IT NOW PURPORTS TO CHALLENGE

In this case, petitioner seeks a declaration that the DBE program is unconstitutional "on its face," Pet. Br. 9, to the extent it borrows a racial presumption from Section 8(d)(3) of the SBA to identify socially and economically disadvantaged individuals. Because petitioner challenges the statute and regulations on their face, petitioner cannot prevail

merely by asserting that they *might* be applied in an unconstitutional manner. Instead, petitioner may prevail only if it "[i]s apparent that" the statute and regulations "could *never* be applied in a valid manner." *Members of the City Council of the City of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 797-798 (1984) (emphasis added). A facial challenge is thus "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [law] would be valid. The fact that the [law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). Accordingly, the narrow issue before the Court is whether the statutory DBE presumption and DOT's DBE regulations are incapable of constitutional application.[3]

Petitioner purports to narrow further the issues before this Court by limiting its challenge to the statutory provisions that govern direct federal procurement. Petitioner has always focused on the statutory definitions of "socially and economically disadvantaged," which Congress incorporated into TEA-21 from Section 8(d)(3) of the SBA, as well as the certification standards and procedures employed to identify DBEs. Those standards and procedures apply both to DOT's aid program, which provides federal funds to state and local governments, and to DOT's direct spending for highway construction on federal land. See pp. 7-8 & note 1, *supra*; Pet. Br. 7, 9, 16.

Purporting to clarify the scope of its challenge, petitioner now declares that it is *not* challenging any aspect of DOT's state and local aid program. "[T]his case," petitioner declares, "involves only" DOT's direct federal contracts. Pet. Br. 15-16, 27. Petitioner thus does not ask this Court to review the Secretary of Transportation's DBE program, which the court of appeals upheld, and which this Court identified in the second question presented. Rather, petitioner focuses on the government-wide "goal setting" and "goal achievement mechanisms" implemented under Section 8(d)(4) through 8(d)(6) of SBA, 15 U.S.C. 637(d)(4)-(6), and the Federal Acquisition Regulations (FAR), 48 C.F.R. Pt. 19. See Pet. Br. 13-14; see also pp. 7-8, *supra*. In fact, petitioner now claims that it is injured, not by anything TEA-21 or the Secretary's DBE regulations require, but by the subcontracting plan requirement found in Section 8(d)(4)(B), 15 U.S.C. 637(d)(4)(B), under which prime contractors must submit contract-specific plans that establish subcontracting goals for DBE participation. Pet. Br. 13-14.

Petitioner, however, did not properly challenge Sections 8(d)(4) through 8(d)(6) of the SBA in the courts below, and those courts did not consider such a challenge. The court of appeals found "no indication from any of the parties in their briefs or elsewhere that the particular requirements of paragraphs (4)-(6) of § 8(d) are at issue in the instant lawsuit." Pet. App. 86 n.35. Nor were those provisions ever part of this case. The "scope of this case," petitioner declares, "includes all of the statutory definitional underpinnings, goal setting, and goal achievement mechanisms that *gave rise to the terms of the* * * * *contract*" petitioner was denied in 1989. Pet. Br. 15 (emphasis added). But Sections 8(d)(4) through (6) of the SBA did not "g[i]ve rise to" any part of that contract. "None of the parties in this case contend that SBA § 8(d)(4), 15 U.S.C. 637(d)(4), pertains to the SCC." Pet. App. 63 n.24. Nor did any other provision of the SBA petitioner now purports to challenge appear in that 1989 contract. In fact, petitioner's contract specifically stated that it did *not* include the subcontractor plan requirement under Section 8(d)(4). See Gov't App. 201a, 202a.[4]

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[3] No as-applied challenge is properly before this Court. The only feature of the Secretary's program ever applied to petitioner was the SCC that petitioner originally challenged. As noted earlier (pp. 2, 10, *supra*), that program, which was held unconstitutional as applied to petitioner, has been discontinued.

[4] Petitioner's extensive discussion of subcontractor plans, Pet. Br. 13, and its speculation that they are "coercive," *id.* at 14, are thus beyond the scope of this case. Petitioner's claim that the provisions are applied in a

Petitioner's failure to mount a proper challenge to Sections 8(b)(4) through (6) below and the court of appeals' refusal to address those provisions bar their consideration here. *E.g.*, *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). The court of appeals, moreover, specifically held that petitioner lacks "standing to challenge paragraphs (4)-(6) of 15 U.S.C. § 637(d)." Pet. App. 14; *id.* at 86 n.35. See also Pet. Br. 6 n.2 ("The panel denied standing to challenge 15 U.S.C. §§ 637(a), 644(g), and 637(d)(4-6)."). In light of petitioner's failure to challenge that holding in its petition, its attempt to raise Sections 8(d)(4)-(6) of the SBA for the first time in its brief on the merits is unavailing. See *Hagen* v. *Utah*, 510 U.S. 399, 409 (1994).

Petitioner's belated attempt to "smuggl[e] additional questions" into this lawsuit, *Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 32 n.6 (1993), is particularly problematic because petitioner has not shown any realistic possibility that it will be injured by an application of paragraphs 8(d)(4) through (6). Those paragraphs are implicated only by DOT's direct contracting, not DOT's state and local aid program. But the results of the Department of Commerce benchmark study preclude the use of race-conscious criteria—and therefore consideration of DBE utilization or any race-conscious aspects of paragraphs 8(d)(4)-(6) in making awards—in direct federal contracting in every area in which petitioner does business, as petitioner concedes. Pet. Br. 14; pp. 8-10 & 21 note 4, *supra*. Petitioner thus cannot show any threatened injury from those provisions, much less one that might excuse its dual failures properly to raise those provisions below and to challenge the court of appeals' holding that it lacks standing to raise them.

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coercive manner, moreover, cannot be raised in a facial challenge unsupported by a record that might show how, in fact, those provisions are applied. The claim is also without merit. DOT is not aware of any instance in which contracting decisions have been influenced by the degree of DBE utilization provided in a subcontracting plan in any area where the Department of Commerce's benchmark study bars use of race-conscious criteria, and it is issuing guidance to ensure that such does not occur.

Petitioner's submission also casts serious doubt on the extent to which there remains a real and substantial controversy of any sort. With respect to petitioner's past injury in direct federal procurement, the program that injured petitioner was declared unconstitutional as applied, was discontinued, and is not properly before this Court. See pp. 2, 10, *supra*. With respect to petitioner's claim for forward-looking relief, any alleged continuing injury in direct federal procurement is foreclosed by the termination of the SCC program and the results of the Department of Commerce's benchmark study. If petitioner's assertion that this "case deals exclusively with direct federal procurement," and "has nothing to do with financial assistance," Pet. Br. 27, is accepted, there is simply no basis for prospective relief.

II. TEA-21 AND THE SECRETARY'S DBE REGULATIONS ARE NARROWLY TAILORED TO SERVE A COMPELLING GOVERNMENT INTEREST

Eliminating racial discrimination and its effects remains one of the Nation's great challenges. "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Adarand I*, 515 U.S. at 237. Congress has found that many Americans, because "of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control," lack equal "opportunity for full participation in our free enterprise system," and thus are "socially and economically disadvantaged" on account of race or ethnicity. 15 U.S.C. 631(f)(1). Congress therefore has attempted to ensure that past discrimination and present bias do not "cause federal funds to be distributed in a manner" which reflects and "reinforce[s] prior patterns of discrimination." *Croson*, 488 U.S. at 504.

The Secretary's DBE program, which Congress reauthorized in TEA-21, is one such effort. To the extent that program relies on race-conscious criteria, it is subject to strict scrutiny. Racial classifications—even if employed to combat discrimination and its effects—are constitutional only if they serve a compelling government purpose and are narrowly tailored to achieve that end. *Adarand I*, 515 U.S. at 227. Although that standard is demanding, this Court has gone out of its way "to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Id.* at 237. "When race-based action is necessary to further a compelling interest," the Court has stated, "such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out" in its cases. *Ibid.*[5] As explained below, petitioner has not shown that the Secretary's DBE program is incapable of meeting that exacting standard.

A. CONGRESS HAS A COMPELLING INTEREST IN ELIMINATING DISCRIMINATION AND ITS EFFECTS ON GOVERNMENT SPENDING AND PROCUREMENT

"It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *Croson*, 488 U.S. at 492 (plurality opinion). Congress thus may take steps to avoid "becom[ing] a passive participant in a system of racial exclusion practiced by elements of the local construction industry." *Ibid.* And Congress may legitimately invoke its constitutional powers to ensure that such a system does not "cause federal funds to be distributed in a manner" which reflects and "reinforce[s] prior patterns of discrimination." *Id.* at 504. Petitioner, in fact, concedes that the use of race-conscious measures as "a last resort to 'remedy private discrimination'" is a "possible justification" for race-conscious government policies. Pet. Br. 22 (quoting *Croson*, 488 U.S. at 492 (plurality opinion)). Accordingly, rather than focus on

[5] Petitioner's argument (Br. 18-23) that racial classifications are *per se* unconstitutional thus is inconsistent with this Court's precedents.

the adequacy of Congress's interest, petitioner argues that Congress did not have a "strong basis in evidence" for finding a national problem of discrimination in highway contracting. See *id.* at 26. The district court and the court of appeals both properly rejected that argument.

1. *Congress Had Ample Evidence Of Discrimination When It Enacted TEA-21*

Treating the compelling-interest inquiry as a question of fact, petitioner argues (Br. 23-28) that the court of appeals erred in relying on legislative and administrative materials that identify the effects of discrimination in the highway construction and transit industry. Such sources, petitioner asserts, are neither "sworn testimony given from personal knowledge" nor otherwise admissible. *Id.* at 23-26. That argument—which was not properly raised below—betrays a misunderstanding of the compelling-interest inquiry, which is, after all, a legal inquiry. Federal courts do not measure the substantiality of Congress's interests by requiring Congress to prove its interest in a *de novo* trial. Instead, federal courts properly "examine first the evidence before Congress," and then review any "further evidence" necessary to resolve the matter. *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 196 (1997). The court of appeals and district court followed that methodology and correctly concluded, as a matter of law, that Congress had a compelling interest in enacting TEA-21's contracting provisions and their predecessors. Moreover, even if one were to accept petitioner's effort to recharacterize that legal conclusion as a factual finding, petitioner's request that this Court reconsider the findings of the district court and court of appeals would have to overcome this Court's traditional "reluctan[ce] to disturb findings of fact in which two courts below have concurred." *United States* v. *Doe*, 465 U.S. 605, 614 (1984).[6]

[6] Petitioner's contention (Br. 27) that the court of appeals did not review the legislative record and instead "rel[ied] exclusively on the content of Appendix A,"—*Proposed Reforms to Affirmative Action in Federal Procurement*, 61 Fed. Reg. 26,041, 26,050 (1996)—is incorrect. The

The enormous body of evidence before Congress, accumulated over 30 years, establishes the compelling nature of Congress's interest in reauthorizing the DBE program. Throughout the 1970s, a Permanent Select Committee of the House of Representatives conducted extensive hearings on the effects of discrimination on the distribution of contracting opportunities in a variety of industries. See Gov't App. 190a (listing hearings). Based on its investigation, the Committee concluded that past discrimination disproportionately hindered the participation of minority-owned businesses in federal procurement projects. See *Summary of Activities, A Report of the House Comm. on Small Business*, H.R. Rep. No. 1791, 94th Cong., 2d Sess. 182 (1977). Congress responded by enacting the Public Works Employment Act of 1977, 42 U.S.C. 6705(f)(2), which this Court upheld in *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980). "Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination." 448 U.S. at 477-478 (plurality); accord *id.* at 458-467, 473; *id.* at 503, 505-506 (Powell, J., concurring); *id.* at 520 (Marshall, J., concurring). See also H.R. Rep. No. 468, 94th Cong., 1st Sess. 1-2, 11-12, 28-30, 32 (1975); U.S. Comm'n on Civil Rights, *Minorities and Women as Government Contractors* 20-22, 112, 126-127 (May 1975). Congress's investigations throughout the 1980s and 1990s, Gov't App. 191a-194a, documented that minority-owned firms continue to suffer discrimination and its effects in a variety of ways.[7]

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court of appeals, after conducting its own searching review of the legislative record, concluded "that there is an even more substantial body of legislative history supporting the compelling interest in the present case than that cited by" the government's submission, Pet. App. 33 n.12, and cited materials not mentioned in Appendix A, *e.g.*, *id.* at 36-37 (statements of Toni Hawkins, M. Harrison Boyd, and Anthony Robinson).

[7] See, *e.g.*, *Small and Minority Business in the Decade of the 80's: Hearings Before the House Comm. on Small Business*, 97th Cong., 1st Sess. Pt. 1, 106, 241 (1981) (*1980s Hearings*); *Minority Business and Its Contributions to the U.S. Economy: Hearing Before the Senate Comm. on Small Business*, 97th Cong., 2d Sess. 44-45, 50, 88, 95 (1982). The hearings showed that public and private contracting officers alike retained a negative perception of the skills and competence of minorities. See *1980s Hearings* 106, 114, 118, 241. The House Report found that the observed disparities could "not [be] the result of random chance," and concluded that "past discrimination has hurt the socially and economically disadvantaged individuals in their entrepreneurial endeavors." H.R. Rep. No. 460, 100th Cong., 1st Sess. 18 (1987). The Small Business Administration's annual reports to Congress throughout the 1990s supported that conclusion. See, *e.g.*, *The State of Small Business: A Report of the President to Congress* 362 (1994) (minority-owned businesses represent 9% of total business community but receive 4.1% of federal procurement dollars). See also *Minority Construction Contracting: Hearing Before the Subcomm. on SBA, the General Economy, and Minority Enterprise Development of the House Comm. on Small Business*, 101st Cong., 1st Sess. (1989).

Congress likewise gathered extensive evidence of the incidence of discrimination in the specific context of highway contracting. After having collected such evidence for a decade, Congress in 1982 added a ten-percent nationwide aspirational goal for DBE participation on federally funded highway construction and mass transit projects. See Surface Transportation Assistance Act of 1982 (STAA), Pub. L. No. 97-424, § 105(f), 96 Stat. 2100. For two years, through at least eight hearings, Congress then investigated and evaluated the effects of those provisions before renewing them for four years in the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. No. 100-17, § 106(c)(2)(B), 101 Stat. 146. See Gov't App. 195a (listing hearings). The Senate Report accompanying STURAA explained Congress's decision:

> The Committee has considered extensive testimony and evidence on the bill's DBE provision, and has concluded that this provision is necessary to remedy the discrimination faced by socially and economically disadvantaged persons attempting to compete in the highway and mass transit construction industry.

S. Rep. No. 4, 100th Cong., 1st Sess. 11 (1987). Following that renewal, Congress continued reviewing the program, holding hearings and gathering evidence. See Gov't App. 196a-197a (listing hearings). Each time, the evidence showed that discrimination, past and present, continued to deny socially and economically disadvantaged business owners opportunities to participate in and compete for work on federal and federally aided highway construction contracts. As a result, Congress reauthorized the DBE program in ISTEA in 1991, 105 Stat. 1919-1921, and most recently in TEA-21.

The extensive record before Congress included evidence of the specific problems confronted by DBEs. With respect to access to necessary capital, minority applicants generally —and minority applicants in the construction industry in particular—were denied bank loans at a higher rate than non-minorities with identical collateral and credentials. Pet. App. 35-39. A study of the construction industry supported by the U.S. Bureau of the Census and National Science Foundation found that "blacks, controlling for borrower risk, are less likely to have their business loan applications approved than other business borrowers," and generally receive smaller loans when approved. Caren Grown & Timothy Bates, *Commercial Bank Lending Practices and the Development of Black Owned Construction Companies*, 14 J. Urb. Aff. 25, 26, 39 (1992) (Grown & Bates) (Gov't Lodging 1, 2, 15) (discussed by Rep. Norton, 144 Cong. Rec. H3958 (May 22, 1998)).[8] A survey of 58 state and local studies of disparity in government contracting found that "African Americans with the same level of financial capital as whites receive about a third of the loan dollars when seeking business loans." Maria E. Enchautegui et al., Urban Institute, *Do Minority-Owned Businesses Get a Fair Share of Government Contracts?* 36 (Dec. 1997) (Urban Institute Report) (Gov't Lodging 65) (citations omitted) (discussed by

[8] For the convenience of the Court, we are lodging copies of studies and materials upon which Congress and the court of appeals relied.

Rep. Norton, 144 Cong. Rec. at H3959 (May 22, 1998)). Congress, moreover, heard first-hand accounts of subtle and not-so-subtle discrimination in the provision of needed capital.[9]

Discrimination and entrenched patterns resulting from years of exclusion also prevent minority business owners from obtaining surety bonds, which generally are required by state and federal procurement rules. The "[i]nability to obtain bonding is one of the top three reasons that new minority small businesses have difficulty procuring U.S. Government contracts." *Problems Facing Minority and Women-Owned Small Businesses: An Interim Report*, H.R. Rep. No. 870, 103d Cong., 2d Sess. 14-15 (1994); see also *Surety Bonds and Minority Contractors: Hearing Before the Subcomm. on Commerce, Consumer Protection and Competitiveness of the House Comm. on Energy and Commerce*, 100th Cong., 2d Sess. 8-9 (1988). Again, Congress heard from individuals who had encountered difficulties created by discrimination and its effects on the availability of bonding.[10]

The evidence showed that some prime contractors engaged in discriminatory bid-shopping, allowing a preferred subcontractor to match any low bid submitted by a minority-owned contractor. See, *e.g.*, *How State and Local Governments Will Meet the Croson Standard: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 54 (1989); see also *State of Colorado and the Colorado Department of*

[9] For example, one bank denied a minority-owned business a loan to bid on a public contract worth $3 million, but offered a loan for the same purpose to a non-minority-owned firm with an affiliate in bankruptcy. See *Availability of Credit to Minority-Owned Small Businesses: Hearing Before the Subcomm. on Financial Institutions Supervision, Regulation and Deposit Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 103d Cong., 2d Sess. 20 (1994) (Toni Hawkins).

[10] See H.R. Rep. No. 870, *supra*, at 9, 16-17 (explaining that one black contractor was forced to seek bonding from out of state after local non-minority competitors told local sureties not to underwrite him). The Louisiana Disparity study provides corroboration. 2 *State of Louisiana Disparity Study* 91, 204-205 (June 1991) (Gov't Lodging 215, 329-330).

Transportation Disparity Study, Final Report 5-56, 5-58 (Apr. 1, 1998) (*Colorado Study*) (Gov't Lodging 636-638) (cited by Sen. Chafee, 144 Cong. Rec. at S1493, S5413 (Mar. 6 & May 22, 1998)); 2 *State of Louisiana Disparity Study* 69, 72-73 (June 1991) (*Louisiana Study*) (Gov't Lodging 189, 193, 196-197) (cited by Sen. Kennedy, 144 Cong. Rec. at S1482 (Mar. 6, 1998)).[11] Some suppliers charged higher prices to minority customers, raising their costs and rendering them less competitive. See, *e.g.*, *Colorado Study* 5-78 (Gov't Lodging 658); *Louisiana Study* 87-88 (Gov't Lodging 211-212); Ray Marshall & Andrew Brimmer, *Public Policy & Promotion of Minority Economic Development*, Pt. 2, at 72-77 (June 29, 1990) (Gov't Lodging 924-929) (minority firm in Georgia found problem so pronounced that it sent white employees to purchase supplies).

Congress also heard evidence that black, Hispanic, Asian, and Native-American-owned businesses were underutilized in government contracts. *E.g.*, Urban Institute Report 11, 14-15, 19-20 (Gov't Lodging 41, 44-45, 49-50). For example, the Urban Institute Report found that minority-owned businesses received only 57 cents out of every state and local contracting dollar that they should have received based on the proportion of "ready, willing, and able" firms that were minority-owned. *Id.* at 1, 19-22, 61 (Gov't Lodging 32, 44-47, 89). Throughout the debates on TEA-21, members of Congress noted study after study, incident after incident, showing gross disparities in utilization.[12] See also *Unconsti-*

[11] See also *Associated Gen. Contractors of Cal., Inc.* v. *Coalition for Econ. Equity*, 950 F.2d 1401, 1415 (9th Cir. 1991) (citing reports that minority firms were "denied contracts despite being the low bidder," and "refused work even after they were awarded the contracts as low bidder"), cert. denied, 503 U.S. 985 (1992); *Cone Corp.* v. *Hillsborough County*, 908 F.2d 908, 916 (11th Cir.), cert. denied, 498 U.S. 938 (1990).

[12] Hispanic-owned firms received .26% and women-owned firms received .18% of state-funded highway construction contracts in Colorado, while over 99% of the state contracts went to white-owned firms, 144 Cong. Rec. at S5414 (May 22, 1998); in the United States as a whole, minorities own nine percent of construction companies but receive only four percent of construction receipts, *id.* at S1403 (Mar. 5, 1998); white-owned construction firms receive 50 times as many loan dollars as African-American-owned firms with identical equity, *id.* at S1422; African Americans were three times more likely, and Hispanics 1.5 times more likely, to be rejected for business loans than whites, according to a Denver study, *id.* at S1493 (Mar. 6, 1998).

tutional Set-Asides: ISTEA's Race-Based Set-Asides After Adarand: Hearing Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Judiciary Comm., 105th Cong., 1st Sess. 55-56, 58-59, 64, 69, 74-76, 120 (1997).

Finally, the evidence showed that the termination of similar state and local DBE programs had almost always caused inordinate disparities to return. DBE participation in the state-funded portion of a Michigan highway program fell to zero nine months after that State's DBE program ended, while the federally funded portion (which continued to operate under DOT's DBE program) had a 12.7% participation rate. 144 Cong. Rec. at S1404 (Mar. 5, 1998). In Tampa, after the city discontinued its DBE plan in 1989, the number of contracts awarded to Latinos was suddenly cut in half, while the number of contracts awarded to African Americans fell by 99%. Similarly dramatic drops in DBE participation resulted in Richmond, Virginia; Hillsborough County, Florida; and Philadelphia. See U.S. Comm'n on Minority Business Development, *Final Report* 99 (1992) (discussed by Rep. Norton, 144 Cong. Rec. at H3958 (May 22, 1998)). See also *id.* at S1409-1410, S1420-1421, S1429-1430 (Mar. 5, 1998). Indeed, the recent GAO Report upon which petitioner places great reliance, *Disadvantaged Business Enterprises* (June 2001) (GAO Report), found that DBE contracting had "dramatically declined" when, in the two States it examined, local DBE programs were terminated. See GAO Report 38-41 (Gov't Lodging 1886-1888).[13] As TEA-21's floor manager, Senator Baucus, explained to his

[13] Because petitioner reproduces only part of the GAO Report in its appendix and omits charts and the report's methodology, we have included a complete copy in the lodging (at 1847-1933).

colleagues, such "dramatic decreases in DBE participation in those areas in which DBE programs have been curtailed or suspended" show not merely "underutilization of women- and minority-owned business," 144 Cong. Rec. at S5414 (May 22, 1998), but that race-neutral alternatives sometimes cannot level the playing field.[14]

In view of that record, both houses of Congress in 1998 rejected amendments to TEA-21 that would have eliminated the DBE program. See 144 Cong. Rec. at S1496 (Mar. 6, 1998), H2011 (Apr. 1, 1998). Even opponents of the DBE program agreed that there was evidence of discrimination. As Representative Roukema, the sponsor of an unsuccessful amendment to repeal the DBE program, explained, the program's opponents "are not suggesting that there is no discrimination." *Id.* at H2000 (Apr. 1, 1998).

2. *Petitioner's Objections To The Evidence Before Congress Are Unsubstantiated And Insubstantial*

Responding to the vast body of evidence before Congress, petitioner argues that *the court of appeals* did not review the evidence under the proper standard. Petitioner argues that it failed to ensure that the statistical evidence before Congress was "derived from the proper sample pool," Pet. Br. 29; did not scrutinize the studies' methodologies, *id.* at 30; and did not ensure that they conclusively eliminated all nondiscriminatory explanations, *id.* at 30-31.

Petitioner misunderstands the judicial role in evaluating the existence of a compelling interest. Federal courts do not sit as peer-review boards to conduct *sua sponte* review of congressional findings and methodologies for scientific accuracy. Petitioner failed to identify the specific evidence it believes unreliable, to provide the reasons for that concern, or to explain how the voluminous evidence remaining could conceivably be insufficient. Nor did petitioner, despite the

[14] This Court often accords the views of a bill's floor managers particular weight in determining legislative intent. See generally *United States* v. *Enmons*, 410 U.S. 396, 405 n.14 (1973); *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658, 686-687 (1978).

opportunity to do so, introduce its own evidence to show that racial discrimination in the highway construction industry and its effects have ceased to exist. Pet. App. 47 n.14. Instead, petitioner offered only "decidedly vague urgings" of bias, *id.* at 46 n.14, an "unfocused attack" on disparity studies generally, *id.* at 47 n.14, and an assertion that the "various congressional reports and findings" were "conclusory," *id.* at 51. Such contentions are an insufficient basis on which to strike down an Act of Congress, much less one founded on 30 years of hearings, investigations, conclusions, and findings. "Given the deference 'due the duly enacted and carefully considered decision of a co-equal and representative branch of our Government,'" this Court does "not lightly second-guess such legislative judgments, particularly where the judgments are based in part on empirical observations." *Board of Educ. of the Westside Cmty. Sch.* v. *Mergens*, 496 U.S. 226, 251 (1990) (plurality opinion of O'Connor, J.).

In any event, petitioner's challenges to Congress's methods and conclusions are without merit. For example, petitioner asserts (Br. 29) that Congress was required to compare the availability of contractors who "not only have the necessary expertise" but "who also have met * * * bonding requirements and capitalization." Bonding and access to capital, however, are two key areas where Congress found that minority businesses suffer discrimination. See pp. 28-29, *supra*. Adjusting the data as petitioner suggests would thus treat minority businesses as unqualified precisely because they suffer discrimination. In attempting to determine whether discrimination exists, it is not error to omit a variable that itself is tainted by discrimination. See *Coates* v. *Johnson & Johnson*, 756 F.2d 524, 544 (7th Cir. 1985); *Valentino* v. *United States Postal Serv.*, 674 F.2d 56, 71 n.26, 73 n.30 (D.C. Cir. 1982).[15]

[15] In addition, petitioner's reliance (Br. 34) on the GAO Report is misplaced. Although the report expressed concern about the difficulty of collecting relevant data regarding subcontractors, such data is available. See, *e.g.*, Urban Institute Report 15-16, 41 (Gov't Lodging 45-46, 71). The

Petitioner's contention (Br. 29) that the studies before Congress may not have compared the appropriate pools of "ready, willing, and able" minority and non-minority contractors in the relevant markets is also unfounded. Study after study made the proper comparisons. See, *e.g.*, Urban Institute Report 19-22 (Gov't Lodging 49-52); *Louisiana Study* 182, 187-194 (Gov't Lodging 306, 311-318). And petitioner is incorrect to assert (Br. 30-31) that the studies did not use tools such as regression analysis to reduce the possibility that the disparities were caused by factors other than discrimination; many did, as petitioner concedes. See Br. 31 (admitting that at least three studies held all the other factors equal). See also Grown & Bates 34, 39 (Gov't Lodging 10, 15); *Louisiana Study* A1-A6 (Gov't Lodging 356-362).

In any event, discrimination need not be "prove[d] * * * with scientific certainty," or using "regression analysis" that "include[s] *all* measurable variables thought to have an effect." *Bazemore* v. *Friday*, 478 U.S. 385, 399-400 (1986) (Brennan, J., concurring). See also *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 254 (1981) (prima facie case "eliminates the most common nondiscriminatory reasons"). Consequently, a party impeaching a study's validity must do more than hypothesize about factors the study did not consider; instead, it must introduce "evidence to support the contention that the missing factor can explain the disparities." *EEOC* v. *General Tel. Co. of the N.W., Inc.*, 885 F.2d 575, 580 (9th Cir. 1989), cert. denied, 498 U.S. 950 (1990) (quoting *Palmer* v. *Shultz*, 815 F.2d 84, 101 (D.C. Cir. 1987)). *Concrete Works of Colo., Inc.* v. *City & County of Denver*, 36 F.3d 1513, 1524-1525 (10th Cir. 1994), cert. denied, 512 U.S. 1004 (1995). See also *Dothard* v. *Rawlinson*, 433 U.S. 321,

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GAO Report omitted that information not because it was unavailable, but rather because the GAO's mail survey did not produce the information, and because recipients of the survey did not have the data in an electronic format that would have made its accumulation and manipulation sufficiently easy. See GAO Report 52-59, 62-64, 77 (Gov't Lodging 1900-1907, 1910-1912, 1925).

331 (1977) (party "not required to exhaust every possible source of evidence" because opposing party "is free to adduce countervailing evidence of [its] own"); *Contractors Ass'n of E. Pa., Inc.* v. *City of Philadelphia*, 6 F.3d 990, 1007 (3d Cir. 1993); *Sobel* v. *Yeshiva Univ.*, 839 F.2d 18, 34 (2d Cir. 1988), cert. denied, 490 U.S. 1105 (1989); *Catlett* v. *Missouri Highway & Transp. Comm'n*, 828 F.2d 1260 (8th Cir. 1987), cert. denied, 485 U.S. 1021 (1988). Petitioner failed to do that here.

More broadly, it is unclear what all of petitioner's statistical criticism really proves. Strict scrutiny requires the government to point to a compelling interest with "a strong basis in evidence" and observable roots in the actual marketplace. It does not require statistical perfection, a standard that social science itself is incapable of achieving. None of petitioner's statistical objections casts genuine doubt about Congress's overall finding of continuing discrimination and its effects in the construction industry.

3. *Congress May Condition Spending To Address Nationwide Problems Affecting Nationwide Appropriations*

Finally, petitioner claims (Br. 33-34) that Congress lacks constitutional authority to enact legislation like TEA-21 unless it finds discrimination in a majority of States. To the extent petitioner asserts that Congress cannot enact even narrowly tailored legislation—legislation that imposes a remedy only in those markets where there is discrimination to remedy—unless it finds discrimination in more than 25 States, the contention is utterly without merit. As a national sovereign, the federal government has a compelling interest in avoiding improper (discrimination-based and discrimination-reinforcing) distribution of federal funds nationwide. Thus, while a state or local government has only "the authority to eradicate the effects of private discrimination within its own legislative jurisdiction," Congress has the power to ensure that federal spending does not reinforce discrimination in any location where federal dollars are spent. *Croson*, 488 U.S. at 490-492 (plurality); *Oregon* v. *Mitchell*, 400 U.S. 112, 284 (1970) (Stewart, J., concurring in part).

Petitioner's reliance on *United States* v. *Morrison*, 529 U.S. 598 (2000), is thus misplaced. *Morrison* was concerned with whether Congress's creation of a federal remedy for gender-based violence was within Congress's power under the Commerce Clause and Section 5 of the Fourteenth Amendment. This Court concluded that Congress could not create such a remedy under the Commerce Clause, because the remedy was for "noneconomic" violent crimes that have "always been the province of the States." *Id.* at 618-619. And the Court concluded that Congress could not rest the legislation on Section 5 of the Fourteenth Amendment because the Act was not directed at state actors. *Id.* at 626.

Unlike the legislation at issue in *Morrison*, TEA-21 falls squarely within the national government's enumerated powers, regardless of geographic scope. TEA-21 both authorizes the spending of federal funds for highway and mass transit projects and attaches conditions to that spending to achieve national goals. Congress has unquestioned authority under the Spending Clause, U.S. Const. Art. I, § 8, to "further broad policy objects by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987). Petitioner cites no authority for the novel proposition that Congress cannot further its interest in remedying discrimination by imposing conditions on its spending unless it finds that the evil of discrimination exists in a majority of States.

Legislation *mandating* the use of race-conscious remedies nationwide, even in regions where discrimination does not persist, would raise more difficult questions. But such concerns are best addressed through a narrow-tailoring analysis, not the compelling-interest inquiry. Pet. App. 27 n.10. In any event, such complaints have little place in the context of TEA-21 as implemented by DOT. Together, the statutory and regulatory provisions are designed to limit race-conscious remedies to *only* those jurisdictions where discrimination or its effects are a problem, and race-neutral relief is insufficient. See pp. 38-50, *infra*.

Indeed, for precisely that reason, petitioner is incorrect to assert (Br. 14, 18, 33-44) that the Department of Commerce's benchmark study demonstrates a lack of "congruence," *i.e.*, a failure to "match * * * the geographic area in which * * * discrimination is found, and the area in which the race-based solution is applied." To be sure, that study found no disparities in direct federal procurement of prime contractors for highway construction on federal lands in many jurisdictions.[16] In the context of direct federal procurement, however, the DOT *precludes* the use of race-based criteria *unless* the Department of Commerce's benchmark study finds disparities in the relevant market. 61 Fed. Reg. at 26,046-26,047; 48 C.F.R. 19.201(b); pp. 8-10, 21-22 & note 4, *supra*. Similarly, in the context of DOT's aid program, recipients are not authorized to use race-conscious remedies *unless* (among other things) localized analyses show underutilization of DBEs and the inadequacy of race-neutral relief suggesting the persistence of discrimination or its effects. See 49 C.F.R. 26.45, 26.51; pp. 5-6, *supra*. Thus, far from disproving geographic "congruence" as petitioner contends, the Department of Commerce's benchmark study and the similar local analyses required by DOT *ensure* it.

In any event, there is no requirement that Congress address only those problems that are both national in scope and

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[16] The Department of Commerce's benchmark study, moreover, examined only *direct federal procurement*—not procurement by States and localities using federal funds from the aid program—and it looked only for disparities in the government's hiring of *prime contractors*. When it comes to discrimination against subcontractors on federally aided projects in localized markets, the individual state studies and the Urban Institute study are a better source. See pp. 28-31, *supra*. In addition, the Department of Commerce's study found overwhelming evidence that the effects of discrimination persist in the *majority* of the approximately 70 industries and markets that compose all areas of federal procurement. 63 Fed. Reg. 35,714-35,715 (1998). Petitioner's assertion (Br. 34 n.23) that the study "disclaims any attempt to find the requisite intentional discrimination" is incorrect; the entire purpose of the study is to find disparities in utilization that are not explained by factors other than race.

of uniform incidence throughout the 50 States. Congress clearly has the power to address national problems like discrimination even if certain jurisdictions remain relatively free of such problems. Outside the spending context, for example, the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, as amended, 42 U.S.C. 1973, establishes nationwide rules to ensure that racial discrimination does not impair the right to vote. Because the incidence of such discrimination is not uniform, moreover, Congress has established special rules for those jurisdictions that (based on statutorily identified practices or patterns) are of particular concern. See *Lopez* v. *Monterey County*, 525 U.S. 266, 269-270 (1999); *e.g.*, *Katzenbach* v. *Morgan*, 384 U.S. 644, 645 n.3, 652 (1966). Nothing prevents Congress from exercising its spending powers to the same effect. Here, Congress and DOT struck a balance that allows Congress to address the national problem of discrimination, while *prohibiting* the use of race-conscious remedies on federally aided projects in jurisdictions where their necessity is not manifest.

B. DOT'S DBE PROGRAM IS NARROWLY TAILORED

Even when race-conscious measures serve a compelling interest, such measures must be narrowly tailored to that end. Petitioner has failed to show that the DBE program is incapable of being administered in a way that meets that narrow-tailoring requirement. DOT's regulations seek to channel remedial benefits to victims of discrimination and proscribe race-conscious measures unless race-neutral means of combating the effects of discrimination are insufficient. Aid recipients thus may use race-conscious remedies only as a last resort. 49 C.F.R. 26.51(a). The regulations further narrowly tailor the program by reserving remedies to those individuals who have confirmed, in a notarized document and subject to possible criminal prosecution, that they have been the victims of social and economic disadvantage; by limiting the geographic scope of remedies; and by limiting duration. The cumulative effect of those restrictions is to limit the use of race-conscious remedies to those situations

where the effects of discrimination are stubborn, persistent, and incapable of eradication through race-neutral measures.

1. *The DBE Program Seeks To Channel Remedial Benefits To Victims Of Discrimination*

DOT's regulations include a variety of features that channel relief to victims of discrimination. Before any remedial measure may be employed, the Secretary's regulations require federal-aid recipients to ascertain "the level of DBE participation [the recipient] would expect absent the effects of discrimination." 49 C.F.R. 26.45(b). This determination relies on the DBE certification process and is not a simple finding of racial under-representation. The state or local recipient of federal aid must look to the number of *DBEs* who are qualified in the relevant market, not the number of entities owned by members of particular races, and compare that to the total number of qualified businesses.

The DBE certification process, moreover, is designed to identify victims of discrimination, and not to classify individuals solely on the basis of race. Although minority-owned entities enjoy a statutory presumption that they qualify as DBEs, their owners must submit a notarized statement declaring that they are, in fact, socially and economically disadvantaged. 49 C.F.R. 26.67(a)(1). They thus, in effect, must certify that they have been "subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities," which is the standard for social disadvantage, 15 U.S.C. 637(a)(5), *and* that their "ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged," which is the standard for economic disadvantage, 15 U.S.C. 637(a)(6)(A). An applicant for DBE certification, moreover, must submit documentation of its owner's personal wealth; if the owner's covered net worth exceeds $750,000, any presumption of disadvantage is conclusively rebutted. See 49 C.F.R. 26.67(a)(2), (b)(1). DBEs also must, on an annual basis, submit a sworn affidavit attesting that there have

been no material changes in circumstances affecting their eligibility. 49 C.F.R. 26.83(j). Likewise, aid recipients must include, as DBEs, businesses that are owned by non-minorities who have qualified for DBE status based on individual circumstances (*i.e.*, proof that they have been victims of discrimination). Finally, even a facially valid certification is rebuttable, 49 C.F.R. 26.67(b)(2), 26.87(a) and (c), and third parties may challenge eligibility by showing that the owner is not actually socially or economically disadvantaged, 49 C.F.R. 26.87. See also S. Rep. No. 4, *supra*, at 28 (presumption is rebuttable).

Those provisions contradict petitioner's claim that the program necessarily extends benefits, based on race alone, to individuals who have not suffered discrimination. As the district court explained in *Interstate Traffic Control* v. *Beverage*, 101 F. Supp. 2d 445, 453 (S.D. W. Va. 2000), the rebuttable presumption of disadvantage would permit an individual who has *not* actually suffered the effects of discrimination and impaired business opportunities to be certified as a DBE *only if* (1) that individual falsely declares that he has suffered disadvantage and (2) the inaccurate declaration goes unchallenged. Petitioner nowhere alleges that such errors are necessarily commonplace, and the possibility of such false declarations does not make the program facially invalid.

As a result, the DBE certification process itself reflects an effort to identify the effects of discrimination and to channel the remedial benefits to victims of discrimination. Furthermore, when recipients calculate the levels of DBE participation, they must consider available evidence to adjust those figures to account for the effect of other factors that might limit DBE participation, so that their estimates reflect the level of DBE participation that would be expected in the absence of discrimination. 49 C.F.R. 26.45(d). Unless that analysis indicates the need for remedial action, and race-neutral mechanisms are inadequate, no race-conscious relief is authorized.

2. *The DBE Program Permits Race-Conscious Measures Only Where Race-Neutral Corrections Are Insufficient*

"In determining whether race-conscious remedies are appropriate," this Court evaluates "the efficacy of alternative remedies." *United States* v. *Paradise*, 480 U.S. 149, 171 (1987) (plurality). Because of the dangers inherent in race-conscious government action, the Court examines whether there has been "consideration of the use of race-neutral means," *Croson*, 488 U.S. at 507, and the extent to which opportunities can be made available "without classifying individuals on the basis of race," *id.* at 510 (plurality). See *Adarand I*, 515 U.S. at 237-238; *Croson*, 488 U.S. at 519 (Kennedy, J., concurring) (racial classifications permissible only "as a last resort"). Seizing on those requirements, petitioner declares that Congress failed to consider "even the obvious race neutral options" before enacting TEA-21. Pet. Br. 45. That is not correct: Congress repeatedly attempted to use race-neutral means to eliminate the effects of discrimination, but found such means inadequate. See Pet. App. 57 ("Adarand does not challenge [the district court's] finding, that Congress over a period of decades attempted to correct [the effects of discrimination] by race-neutral means" and "only after it continued to find discriminatory effects did it first implement a race-conscious remedy."). For example, although petitioner asserts (Br. 43) that Congress should have attempted to overcome discrimination in the provision of bonding by offering bonding assistance, Congress did just that in 1970 by establishing the Surety Bond Guarantee program, 15 U.S.C. 694a, 694b. Nonetheless, five years later, the General Accounting Office reported that the effect in "helping disadvantaged firms to become self-sufficient and competitive has been minimal." Congressional Research Service, Library of Congress, *Minority Enterprise and Public Policy* 53 (1977). The Secretary's DBE program, moreover, continues to require maximum use of race-neutral remedies, such as assistance in meeting bonding requirements, and race-conscious remedies may be invoked only as a last resort.

Only where there is a difference between anticipated DBE utilization and the levels of DBE use that would be expected absent discrimination under the above-described analysis are race-conscious corrections an option. See pp. 39-40, *supra*; 49 C.F.R. 26.45(b). See also 61 Fed. Reg. at 26,049 (in direct federal procurement, race may "be relied on *only* when annual analysis of actual experience in procurement indicates that minority contracting falls below levels that would be anticipated absent discrimination" (emphasis added)). Moreover, even where that analysis suggests that the effects of discrimination persist, race-conscious measures *cannot* be employed *unless* race-neutral means are inadequate. "You must meet the maximum feasible portion of your overall goal," the DOT's regulations provide, "by using race-neutral means of facilitating DBE participation." 49 C.F.R. 26.51(a). See also 64 Fed. Reg. 5112 (1999) ("recipients have to give priority to race-neutral means"). The Justice Department's guidelines, which govern direct federal procurement, similarly declare that federal "agencies at all times" must "use race-neutral alternatives to the maximum extent possible." 61 Fed. Reg. at 26,049. Only "where those efforts are insufficient to overcome the effects of past and present discrimination can race-conscious efforts be invoked." *Ibid.*

Consequently, petitioner's assertion that "[t]here is no evidence of" efforts to use race-neutral means like providing "financing for small firms," "relaxation of bonding requirements," or providing training "for disadvantaged entrepreneurs of all races," Pet. Br. 46, is simply an inaccurate characterization. Such efforts are explicitly required. Indeed, the regulations specifically mandate consideration of each of the race-neutral mechanisms that petitioner identifies, and require that those race-neutral benefits be made available to all small businesses, not just DBEs. Recipients must consider measures such as "assistance in overcoming limitations such as inability to obtain bonding or financing" by "simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from

bids, and providing services to help DBEs, *and other small businesses*, obtain bonding and financing," 49 C.F.R. 26.51(b)(2) (emphasis added); and they must consider offering small businesses "technical assistance," 49 C.F.R. 26.51(b)(3), and logistical and business support, 49 C.F.R. 26.51(b)(9).

The Secretary's regulations also identify numerous race-neutral means that petitioner does not mention. *E.g.*, 49 C.F.R. 26.51(b)(1) (arranging solicitations, bid presentation times, quantities and job sizes, specifications, and schedules to make it easier for small and new businesses to participate); 49 C.F.R. 26.51(b)(4) (ensuring dissemination of opportunities and guidelines to the relevant communities); 49 C.F.R. 26.29 (requiring prompt payment to all small businesses), and permit state and local recipients to develop their own. See also pp. 9-10, *supra* (describing similar requirements for direct federal procurement). In sum, DOT's regulations *require* recipients to consider the efficacy of the "array of race-neutral devices to increase the accessibility of contracting opportunities to small entrepreneurs of all races," *Croson*, 488 U.S. at 509 (plurality), and permit use of race-conscious mechanisms only as a last resort. In light of those limitations, petitioner cannot show that the regulations are incapable of constitutional application.

3. *The DBE Program Is Narrowly Tailored Through Flexibility, Proportionality, And Durational Limits*

"In determining whether an affirmative-action remedy is narrowly drawn to achieve its goal," this Court considers duration, the relationship between any goals and the relevant pool of qualified entities, and the program's flexibility. *Paradise*, 480 U.S. at 187-188 (Powell, J., concurring). With respect to duration, this Court has explained that race-conscious remedies should "not last longer than the discriminatory effects [they are] designed to eliminate." *Adarand I*, 515 U.S. at 238. The Secretary's regulations and the terms of Congress's authorization for the DBE program impose such limits. As noted, race-conscious remedies are permissible only as a last resort. Whenever race-conscious

remedies are imposed as a last resort, recipients must eliminate or curtail them whenever it appears that race-neutral means will provide an adequate solution. 49 C.F.R. 26.51(f). The regulations thus require aid recipients constantly to reassess their programs to ensure that race-conscious remedies remain necessary.[17] Thus, as in direct federal procurement, the structure "is inherently limited" in the use of race-conscious measures." 61 Fed. Reg. at 26,049. As "barriers to minority contracting are removed and the use of race-neutral means of ensuring opportunity succeeds," the program should "automatically reduce, and eventually should eliminate, the use of race in decisionmaking." *Id.* at 26,048. The provisions of TEA-21 authorizing the DBE program, moreover, expire in fiscal year 2003, providing a built-in sunset unless Congress revisits the issue and finds sufficient grounds for renewing the program. In the interim, moreover, the program was the subject of study and review. 112 Stat. 107 (calling for GAO study).

The DBE program also provides narrow tailoring by requiring use of the "relevant statistical pool" in establishing DBE participation objectives, *Croson*, 488 U.S. at 501, and by mandating flexible implementation, *Paradise*, 480 U.S. at 187 (Powell, J., concurring). See also *Ensley Branch, NAACP* v. *Seibels*, 31 F.3d 1548, 1576 (11th Cir. 1994). DOT DBE regulations require each recipient to set annual goals reflecting local business conditions; to set those goals based on the actual number of certified DBEs ready, willing, and able to compete in the recipient's market; and to ensure that the goal reflects the level of participation that would be expected absent discrimination. 49 C.F.R. 26.45; pp. 5-6, 39-40, *supra*. State and local recipients are explicitly directed that they cannot merely adopt the aspirational nationwide

[17] The eligibility of individual participants is also constantly reassessed. DBEs must annually submit an affidavit, swearing under penalty of perjury that there have been no changes in circumstances affecting their eligibility. 49 C.F.R. 26.83(j). As a result, the DBE size and personal net-worth limitations operate as durational limits on participation.

goal of ten-percent participation mentioned in TEA-21, or pursue a goal based on the racial composition of the local populace. 49 C.F.R. 26.41(c); 64 Fed. Reg. at 5107. Contrast *Croson*, 488 U.S. at 502 (rigid 30-percent quota unrelated to "how many MBE's in the relevant market are qualified").

Flexibility is also a hallmark of the DBE program. No penalty is imposed for failure to meet annual goals. 49 C.F.R. 26.47. When a recipient establishes goals for DBE participation for a particular contract, contractors need only pursue that goal in good faith; they are *not* required to achieve it. 49 C.F.R. 26.53(a). If a "bidder/offeror does document adequate good faith efforts," the State or locality "must not deny award of the contract on the basis that the bidder/offeror failed to meet the goal." 49 C.F.R. 26.53(a)(2).

The regulations also strictly prohibit inflexible mechanisms like quotas. 49 C.F.R. 26.43. And the flexibility of the program is further enhanced through waiver provisions, under which a recipient may be relieved from complying with many if not most DBE regulations if it believes that equal opportunity can be achieved through other approaches, or if exceptional circumstances warrant a waiver. 49 C.F.R. 26.15. See 64 Fed. Reg. at 5096, 5102-5103.

4. *Congress's Use Of Racial And Ethnic Presumptions Is Not Fatally Over-Inclusive*

Petitioner's primary claim, in the end, is not that the entire program is overbroad. It is that the racial and ethnic presumption employed by TEA-21 in identifying socially and economically disadvantaged individuals is fatally over-inclusive because not every member of the identified races and ethnic groups is, in fact, socially and economically disadvantaged. Pet. Br. 41-43. That argument does isolate the one race-conscious aspect of the program that operates uniformly, without regard to local circumstances. But the argument ignores the fact that the presumption—as well as DBE certifications generally—are without *any effect* on third parties unless race-conscious remedies (like DBE contract goals) are employed. Because DOT regulations limit the use of race-conscious or DBE-specific remedies to those

markets where they are necessary, the impact of the statute's race-based presumption on parties like petitioner is sharply limited and narrowly tailored.

It is true, of course, that the race-based presumption operates when state and local recipients of federal aid (and the Department of Commerce) conduct analyses or studies to determine the level of DBE participation that would be expected absent discrimination. But the government has a responsibility to identify and remedy racial discrimination. See, *e.g.*, U.S. Const. Amend. XIV, § 5; U.S. Const. Amend. XV, § 2. The government could not discharge that duty without using race-conscious mechanisms for identifying whether racial discrimination exists. Even the gathering of race-conscious data involves a degree of race-conscious government action that would be unnecessary in a perfectly color-blind world. But Congress clearly envisioned that race-based presumptions would aid in the identification of discrimination and its effects. The use of those criteria for that purpose, without more, does not implicate constitutional concerns, and DOT's regulations are written to *prevent* the use of race-conscious remedies that might affect third parties *unless* and *until* the need for such remedies has been identified.

Petitioner's argument also overlooks that the Secretary's implementing regulations seek to channel the benefits of participation to entities owned by individuals who in fact have suffered social and economic disadvantage, *i.e.*, to the victims of discrimination. Under DOT's regulations, the owners of firms seeking DBE designation must submit a notarized statement that they are socially and economically disadvantaged. 49 C.F.R. 26.67(a)(1); pp. 39-40, *supra*. Because any claim of disadvantage may be rebutted, moreover, the primary effect of the presumption is to allocate burdens of proof. Petitioner nowhere shows that shifting the burden of proof to the party opposing certification is inappropriate where the applicant for certification is a member of a group that, as a historical matter, has been

found by Congress or the Small Business Administration to have suffered and to suffer actual discrimination.

Petitioner charges that the notarized statement requirement is "essentially meaningless," Pet. Br. 10 n.6, and that it is invalid because it eliminates the presumption of disadvantage, *id.* at 41-42. Those contentions are in considerable tension with each other, and both are without merit. As to the former, DOT's regulations make it clear that DOT "may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of a DBE in any DOT-assisted program." 49 C.F.R. 26.107(e). Applicants apparently take that warning seriously: In DOT's experience, the notarized statement requirement and net-worth limits have, since being implemented, affected both the number and identity of applicants. See also 61 Fed. Reg. at 26,045 ("The existence of a meaningful threat of prosecution for falsely claiming SDB status * * * will do much to ensure that the program benefits those for whom it is designed."). The speculative possibility that, on occasion, an undeserving individual will benefit, moreover, is no basis for invalidating the program. See *Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 516 (1986). Besides, because petitioner brings a *facial* challenge, speculation about undetected fraud or errors in implementation is irrelevant; the program must be upheld unless it is *incapable* of constitutional implementation.

Petitioner's claim that the notarized statement requirement is inconsistent with the statutory presumption of disadvantage is also unpersuasive. First and foremost, the court of appeals never addressed the validity of the regulation, and petitioner would be the wrong party to challenge it. See Gov't Br. in Opp. 28. If DOT's regulations impermissibly deny contracting opportunities to wealthy minorities who have not suffered discrimination, then those wrongfully denied DBE status would be proper plaintiffs. Petitioner suffers no injury—indeed, could only benefit—from this alleged defect. Second, the presumption continues

to operate as a presumption notwithstanding the notarized statement requirement. An applicant for DBE certification who is not a member of the specified groups must demonstrate social and economic disadvantage by a preponderance of the evidence. 49 C.F.R. 26.67. An applicant for DBE certification who is a member of the specified groups, in contrast, need not present detailed evidence to satisfy the certifying entity; he instead may rely on the presumption. That is the essence of a presumption.

The notarized statement, moreover, serves a different, non-evidentiary function: It prevents abuse and helps ensure that all applicants proceed in good faith. Nothing in the statutory presumption precludes the Secretary from imposing reasonable procedural requirements to deter bad-faith certification requests that, if challenged, would be rejected. And the statute certainly does not require the Secretary to implement the statute in a way that permits applicants to seek certification in bad faith. Nor does the filing of a notarized document prevent a challenge to a company's status as a DBE.

To be sure, DOT's regulations implement the statutory presumption in a manner that is designed to minimize the constitutional and policy concerns that would arise from an inflexible presumption that members of certain groups have suffered economic and social disadvantage. But for that reason, not only the traditional deference owed to the Secretary, *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984), but also the canon favoring the construction that renders the statute constitutional, *Jones* v. *United States*, 526 U.S. 227, 239-240 (1999), support the Secretary's interpretation. Moreover, Congress was well aware of the Secretary's new regulations when it enacted TEA-21, see p. 13, *supra*, and its "repeated references" to the new regulations and their "modes of enforcement * * * justif[y] * * * presuming" that Congress did not view those regulations as contrary to its intent. Cf. *Cannon* v. *University of Chicago*, 441 U.S. 677, 697 (1979).

Petitioner's perceived need to attack the Secretary's implementation of the statutory presumption underscores that petitioner cannot meet its burden of demonstrating that the statutory DBE program is incapable of constitutional application. By limiting DBE status to those who certify that they are victims of discrimination in a notarized document, the Secretary's regulations tailor the broad statutory provisions to the requirements of the Constitution. The regulations are designed to employ race-conscious remedies for the limited purpose of remedying discrimination and its effects. If they fail in that objective, an injured party can bring an as-applied challenge. But petitioner should not be allowed to bring a facial challenge to the DBE program claiming that it is not narrowly tailored and then attack the very regulations that provide the narrow tailoring that petitioner claims is lacking.

Perhaps the most troubling aspect of any remedial scheme is that "innocent persons may" sometimes "be called upon to bear some of the burden of the remedy." *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 281 (1986) (plurality opinion). But the regulations at issue here are designed to minimize that burden so that it is not "'unacceptabl[y] substantial," *Paradise*, 480 U.S. at 182 (plurality). If the application of this program imposes undue hardships on a particular third party in a specific jurisdiction, that problem can be addressed in an as-applied challenge. But that *possibility* does not render the program unconstitutional on its face.

The current program is aimed at redressing the effects of discrimination. 64 Fed. Reg. at 5096 ("program is intended to remedy past and current discrimination against disadvantaged enterprises, ensure a 'level playing field' and foster equal opportunity in DOT-assisted contracts"). It is designed to ensure that aid recipients employ race-conscious remedies only as a last resort. Each recipient of TEA-21 funds sets and attains goals based on demonstrable evidence of the relative availability of ready, willing, and able DBEs in the areas from which it obtains contractors. 49 C.F.R. 26.45. Remedies are limited to those who can attest, in a

notarized document, that they are actual victims of discrimination and have suffered impaired opportunities as a result. And every effort is made to minimize the effect of necessary race-conscious remedies on innocent third parties. See, *e.g.*, 49 C.F.R. 26.33; p. 17, *supra*. The program thus is designed to avoid bestowing undue benefits on DBEs, and to create as level a playing field as constitutionally possible.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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